

## Update: Sexual Assault Benchbook

### CHAPTER 6

#### Specialized Procedures Governing Preliminary Examinations and Trials

##### 6.13 Testing and Counseling for Venereal Disease, Hepatitis, and HIV

Effective May 13, 2004, 2004 PA 98 amended MCL 333.5129 governing testing for venereal disease, hepatitis, and HIV.

##### A. Defendants Arrested and Charged

##### 1. Discretionary Examination and Testing

Replace the last paragraph on page 311 (preceding the bulleted list) with the following text:

Under MCL 333.5129(1), a defendant who is arrested and charged with a violation of any of the following prostitution offenses may, upon order of the court, be examined or tested for venereal disease, hepatitis B infection, hepatitis C infection, HIV infection, or AIDS:\*

\*SCAO Form  
MC 234.

Replace the first full paragraph on page 312 with the following text:

If the examination or test results indicate the presence of venereal disease, hepatitis B infection, hepatitis C infection, HIV infection, or AIDS, the examination or test results must be reported to the defendant, the department of community health, and the appropriate local health department for partner notification, as required under MCL 333.5114 and MCL 333.5114a. MCL 333.5129(1).

##### 2. Mandatory Distribution of Venereal Disease and HIV Information and Recommendation of Counseling

Near the top of page 313, replace the cross-reference to the sixth bullet with the following text:

\*A person charged with or convicted of this crime, or a corresponding local ordinance, is subject to the testing, counseling, and information distribution requirements regarding hepatitis B, hepatitis C, HIV, and AIDS, but not venereal disease. MCL 333.5129(9).

On the middle of page 313, replace the first sentence of last paragraph before subsection (B) with the following text:

Additionally, the judge or magistrate must *recommend* that the defendant obtain additional information and counseling at a local health department testing and counseling center regarding venereal disease, hepatitis B infection, hepatitis C infection, HIV infection, and AIDS. MCL 333.5129(2).

## **B. Defendants Bound Over to Circuit Court**

### **1. Mandatory Examination and Testing**

Near the bottom of page 313, replace the first paragraph in this subsection with the following text:

Under MCL 333.5129(3), a defendant who is bound over to circuit court for a violation of any of the following offenses must be ordered by the district court to be examined or tested for venereal disease, hepatitis B infection, hepatitis C infection, HIV, and HIV antibodies, provided there is reason to believe the alleged violation involved sexual penetration or exposure to a body fluid of the defendant:\*

\*SCAO Form  
234.

## **6.13 Testing and Counseling for Venereal Disease, Hepatitis, and HIV**

### **E. Positive Test Results Require Referral for Appropriate Medical Care**

On page 316, replace the first sentence of the first paragraph in this subsection with the following text:

A person counseled, examined, or tested under MCL 333.5129 and found to be infected with a venereal disease, hepatitis B, hepatitis C, or HIV, must be referred by the agency providing the counseling or testing for appropriate medical care. MCL 333.5129(8).

### **F. Ordering Payment of the Costs of Examination and Testing**

On page 316 after subsection (E) insert the following new subsection:

Upon conviction or juvenile adjudication the court may order an individual who is examined or tested under MCL 333.5129 to “pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test.” MCL 333.5129(10). MCL 333.5129(11) states:

“An individual who is ordered to pay the costs of an examination or test under [MCL 333.5129(10)] shall pay those costs within 30 days after the order is issued or as otherwise provided by the court. The amount ordered to be paid under [MCL 333.5129(10)] shall be paid to the clerk of the court, who shall transmit the appropriate amount to the physician or local health department named in the order. If an individual is ordered to pay a combination of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments upon conviction in addition to the costs ordered under [MCL 333.5129(10)], the payments shall be allocated as provided under the probate code of 1939, 1939 PA 288, MCL 710.21 to 712A.32, the code of criminal procedure, 1927 PA 175, MCL 760.1 to 777.69, and the crime victim’s rights act, 1985 PA 87, MCL 780.751 to 780.834. An individual who fails to pay the costs within the 30-day period or as otherwise ordered by the court is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than \$100.00, or both.”

## CHAPTER 7

### General Evidence

#### 7.4 Selected Hearsay Rules (and Exceptions)

##### D. Statements of Existing Mental, Emotional, or Physical Condition—MRE 803(3)

Near the top of page 346 before the first full paragraph, insert the following text:

A declarant's out-of-court statements of memory or belief when the statements are offered to prove the fact remembered or believed are specifically excluded from the hearsay exception described in MRE 803(3). *People v Moorer*, \_\_\_ Mich App \_\_\_, \_\_\_ (2004). In *Moorer*, the defendant argued against the admission of testimony from witnesses who claimed that the victim told them that he "had a confrontation with defendant; that defendant wanted to kill [the victim]; that defendant had threatened to kill [the victim]; that defendant said he had a bullet for [the victim]; and that defendant was looking for [the victim] with a gun." *Moorer, supra* at \_\_\_.

The Court of Appeals determined that the trial court had improperly admitted several witnesses' testimony about the victim's out-of-court statements because the statements went beyond MRE 803(3)'s exception for statements concerning a declarant's "then existing mental, emotional, or physical condition." *Moorer, supra* at \_\_\_. The Court concluded that the challenged testimony was inadmissible hearsay because it involved the *defendant's* past or presumed future actions rather than describing the *declarant-victim's* intentions or plans. *Moorer, supra* at \_\_\_.

## CHAPTER 7

### General Evidence

#### 7.4 Selected Hearsay Rules (and Exceptions)

##### H. “Catch-All” Hearsay Exceptions—MRE 803(24) and MRE 804(b)(7)

On page 358, before the summary of *People v Lee*, insert the following case summary:

♦ *People v Geno*, \_\_\_ Mich App \_\_\_, \_\_\_ - \_\_\_ (2004):

Defendant was convicted of first-degree criminal sexual conduct for sexually penetrating the defendant’s girlfriend’s two-year-old daughter. During an assessment and interview at a children’s assessment center, the child asked the interviewer to go to the bathroom with her, where the interviewer observed blood in the child’s pull-up. The interviewer asked the child if she “had an owie,” and the child answered, “yes, Dale [defendant] hurts me here” and pointed to her vaginal area. The defendant argued that the child’s statement was improperly admitted under MRE 803(24). The Court of Appeals held that it was not error to admit the child’s statement because the statement was not covered by any other MRE 803 hearsay exception, and the statement met the four requirements outlined in *People v Katt*, 468 Mich 272 (2003).

The defendant also argued that pursuant to *Crawford v Washington*, 541 US \_\_\_ (2004), the defendant’s right to confrontation was violated by the admission of the victim’s statements. The Court of Appeals stated:

“We recognize that with respect to ‘testimonial evidence,’ *Crawford* has overruled the holding of *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), permitting introduction of an unavailable witness’s statement – despite the defendant’s inability to confront the declarant – if the statement bears adequate indicia of reliability, i.e., it falls within a ‘firmly rooted hearsay exception’ or it bears ‘particularized guarantees of trustworthiness.’ *Roberts, supra* at 66. However, we conclude that the child’s statement did not constitute testimonial evidence under *Crawford*, and therefore was not barred by the Confrontation Clause. . . .

“[A]t least with respect to nontestimonial evidence such as the child’s statement in this case, . . . the reliability factors of *People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000), are an appropriate means of determining admissibility. . . . We therefore conclude that defendant has failed to establish plain, outcome-

determinative error with respect to his Confrontation Clause claim.”

## CHAPTER 7

### General Evidence

#### 7.6 Former Testimony of Unavailable Witness

On page 364, after the April 2004 update, insert the following text:

The Michigan Court of Appeals in *People v Geno*, \_\_\_ Mich App \_\_\_, \_\_\_ (2004), held that a child-victim's statement to an interviewer at a children's assessment center does not constitute testimonial evidence under *Crawford v Washington*, 541 US \_\_\_ (2004), and therefore is not barred by the Confrontation Clause.

## CHAPTER 9

### Post-Conviction and Sentencing Matters

#### 9.2 Post-Conviction Bail

##### A. Before Sentencing

On page 442, insert the following text as a new subsection 2 and renumber the remaining subsection appropriately:

##### 2. Convictions For Sexual Assault of a Minor

Effective June 30, 2004,\* if a defendant is convicted of sexual assault of a minor and is awaiting sentence, the court must detain the defendant and deny him or her bail. MCL 770.9b(1). A minor refers to an individual who is less than 16 years of age. MCL 770.9b(3)(a). “Sexual assault of a minor” means a violation of any of the following involving an individual who is less than 16 years of age:

- ♦ First-degree criminal sexual conduct, MCL 750.520b. MCL 770.9b(3)(b)(i).
- ♦ Second-degree criminal sexual conduct, MCL 750.520c. MCL 770.9b(3)(b)(i).
- ♦ Third-degree criminal sexual conduct involving force or coercion used to accomplish penetration, MCL 750.520d(1)(b). MCL 770.9b(3)(b)(i).
- ♦ Third-degree criminal sexual conduct involving penetration of a victim who is mentally incapable, mentally incapacitated, or physically helpless, MCL 750.520d(1)(c). MCL 770.9b(3)(b)(i).
- ♦ Third-degree criminal sexual conduct involving penetration of a victim who is related to the defendant by blood or affinity to the third degree, MCL 750.520d(1)(d). MCL 770.9b(3)(b)(i).
- ♦ Third-degree criminal sexual conduct involving a victim who is between the ages of 16 and 18 and a student at a public or nonpublic school and the defendant is a teacher, substitute teacher, or administrator of that public or nonpublic school, MCL 750.520d(1)(e). MCL 770.9b(3)(b)(i).

**Note:** MCL 770.9b(3)(b)(i) contradicts itself. In order for the defendant to be convicted of MCL 750.520d(1)(e), the victim must be at least 16 years of age but less than 18 years of age. However, pursuant to MCL 770.9b, “sexual assault of a minor” requires that the victim be less than 16 years of age.

\*See 2004 PA 32.



- ♦ Third-degree criminal sexual conduct involving penetration of a victim who is at least 13 years old but under the age of 16, MCL 750.520d(1)(a), if the defendant is five or more years older than the victim. MCL 770.9b(3)(b)(ii).
- ♦ Assault with intent to commit criminal sexual conduct, MCL 750.520g. MCL 770.9b(3)(b)(iii).

## **B. After Sentencing and Pending Appeal**

On page 443, insert the following text as a new subsection 2 and renumber the current subsection 2:

### **2. Convictions For “Sexual Assault of a Minor”**

If a defendant has been convicted and sentenced for committing a sexual assault against a minor and files an appeal or application to appeal, the court must detain the defendant and deny bail. MCL 770.9b(2). See Section 9.2(A)(2), above, for the definition of “sexual assault of a minor.”

## CHAPTER 9

### Post-Conviction and Sentencing Matters

#### 9.3 Testing and Counseling for Venereal Disease, Hepatitis, and HIV

Effective May 13, 2004, 2004 PA 98 amended MCL 333.5129 governing testing for venereal disease, hepatitis, and HIV.

##### A. Mandatory Testing and Counseling

On page 446, replace the first paragraph with the following text:

Under MCL 333.5129(4), a defendant who is convicted of, or a juvenile who is found responsible for, violating any of the following offenses must be ordered by the court with jurisdiction over the criminal prosecution or juvenile hearing to be examined or tested for venereal disease, hepatitis B infection, hepatitis C infection, HIV infection, or AIDS:\*

\*SCAO Form  
MC 234.

### **9.3 Testing and Counseling for Venereal Disease, Hepatitis, and HIV**

#### **D. Positive Test Results Require Referral for Appropriate Medical Care**

On page 448, replace the first sentence in this section with the following text:

A person counseled, examined, or tested under MCL 333.5129 and found to be infected with a venereal disease, hepatitis B, hepatitis C, or HIV must be referred by the agency providing the counseling or testing for appropriate medical care. MCL 333.5129(8).

#### **E. Ordering Payment of the Costs of Examination and Testing**

On page 448 after subsection (D) insert the following new subsection:

Upon conviction or juvenile adjudication, the court may order an individual who is examined or tested under MCL 333.5129 to “pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test.” MCL 333.5129(10). MCL 333.5129(11) states:

“An individual who is ordered to pay the costs of an examination or test under [MCL 333.5129(10)] shall pay those costs within 30 days after the order is issued or as otherwise provided by the court. The amount ordered to be paid under [MCL 333.5129(10)] shall be paid to the clerk of the court, who shall transmit the appropriate amount to the physician or local health department named in the order. If an individual is ordered to pay a combination of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments upon conviction in addition to the costs ordered under [MCL 333.5129(10)], the payments shall be allocated as provided under the probate code of 1939, 1939 PA 288, MCL 710.21 to 712A.32, the code of criminal procedure, 1927 PA 175, MCL 760.1 to 777.69, and the crime victim’s rights act, 1985 PA 87, MCL 780.751 to 780.834. An individual who fails to pay the costs within the 30-day period or as otherwise ordered by the court is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than \$100.00, or both.”

## CHAPTER 9

### Post-Conviction and Sentencing Matters

#### 9.5 Imposition of Sentence

##### E. Probation

##### 5. Contents of Probation Orders

Effective May 26, 2004, 2004 PA 116 amended MCL 771.3 to allow the court to impose an additional condition on probationers. Near the middle of page 461, add the following bullet to the end of the bulleted list:

- ♦ Complete his or her high school education or obtain the equivalency of a high school education in the form of a general education development (GED) certificate. MCL 771.3(2)(q).